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In The
Supreme Court of the United States

OCTOBER TERM, 1968

MARKHAM ADVERTISING COMPANY, INC.; CASEY & STONE COMPANY; COLUMBIA BASIN OUTDOOR ADVERTISING CO.; NORTHWEST OUTDOOR ADVERTISING CORPORATION; OBIE OUTDOOR ADVERTISING, INC.; SUNSET OUTDOOR ADVERTISING COMPANY; YAKIMA VALLEY POSTER SERVICE, INC.; GROVER ADVERTISING INC.; individually and as a class, *Appellants,*

FOSTER AND KLEISER, Division of METROMEDIA, INC., *Plaintiff,*

vs.

THE STATE OF WASHINGTON; WASHINGTON STATE HIGHWAY COMMISSION AND THE HONORABLE MEMBERS THEREOF, CONSISTING OF ERNEST A. COWELL, CHAIRMAN; ROBERT L. MIKALSON, GEORGE D. ZAHN, JAMES M. BLAIR, SR., AND IRVING CLARK, JR., their Officers, Agents and Employees, *Appellees,*

IRA R. GRANT, *Intervenor,*

M. C. BEATIE AND TRANQUILLA KOZAK, *Additional Intervenors.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

ALFRED J. SCHWEPPE
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Attorneys for Appellants

October 15, 1968
657 Colman Bldg.
Seattle, Washington 98104

THE ARGUS PRESS SEATTLE, WASHINGTON

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M. C. BEATIE AND TRANQUILLA KOZAK, *Additional Intervenors.*

JURISDICTIONAL STATEMENT

A. OPINIONS BELOW:

The only reported opinion below is that of the Washington State Supreme Court, filed March 26, 1968, reported at 73 W.D.2d 413 P.2d. . It is reprinted in Appendix F.

B. STATEMENT OF JURISDICTIONAL GROUNDS:

(i) Nature of Proceeding and Statute Under Which Brought

This action was brought as a class action by the named appellants and plaintiff, each engaged in the business of outdoor advertising in the State of Washington, to obtain a declaratory judgment (as permitted by Washington's Declaratory Judgment Act, RCW Chapter 7.24) that Washington State's Highway Advertising Control Act of 1961, as amended, RCW 47.42, Chapter 96, Laws of 1961, as amended by Chapter 3, Laws of 1963, Extraordinary Session, and the rules and regulations promulgated thereunder, are unconstitutional, and to enjoin, pendente lite and permanently, their enforcement.

The general purport of the Highway Advertising Control Act of 1961 is to require appellants to remove virtually all outdoor advertising signs within 660 feet of Interstate and designated "scenic" highways in this state under the guise of an exercise of the state's police power, without compensation.

This appeal is from a final juudgment of the Supreme Court of the State of Washington, affirming the trial court's judgment that the statute, and the regulations promulgated thereunder, are constitutional, against the claim that the statute and the reg-

ulations violate the Constitution of the United States in various particulars.

(ii) Date of Judgment and Other Relevant Dates

(1) Date of trial court (Thurston County, Washington, Superior Court) judgment: March 10, 1967.

(2) Date of affirmance by Washington State Supreme Court: March 26, 1968.

(3) Date of Washington State Supreme Court's Order Denying Petition for Rehearing and Changing Opinion: July 19, 1968.

(4) Date Notice of Appeal filed: July 23, 1968. The Notice of Appeal was filed with the Clerk, Washington State Supreme Court, Olympia, Washington.

(iii) Appellate Jurisdiction — Statutory:

This action draws in question the validity of a Washington State statute on the ground of its being repugnant to the Constitution and laws of the United States; the decisions of the trial court and the Washington State Supreme Court have been in favor of the validity of the statute.

This court therefore has jurisdiction of the appeal under 28 U.S.C. §1257(2).

(iv) Appellate Jurisdiction—Cases Believed to Sustain the Jurisdiction

(1) In general—*Michigan Central Railroad Company v. Michigan Southern Railroad Company,* 60 U.S. 378, 19 How. 378 at 379, 15 L.Ed. 689 (1856); *Standard Oil Company v. Johnson,* 316 U.S. 481 at

482, 62 S.Ct. 1168, 86 L.Ed. 1611 (1942); *American Oil Co. v. Neill,* 380 U.S. 451 at 455, 85 S.Ct. 1130, 14 L.Ed.2d 1 (1965); *Warren Trading Post Co. v. Arizona Tax Commission,* 380 U.S. 685 at 686, 85 S.Ct. 1242, 14 L.Ed.2d 165; and *Watkins v. Conway,* 385 U.S. 188 at 189, 87 S.Ct. 357, 17 L.Ed.2d 286 (1966).

(2) Supremacy of Federal Legislation — *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board,* 315 U.S. 740 at 743, 62 S.Ct. 820, 86 L.Ed. 1154 (1942); *Faitoute Co. v. Asbury Park,* 316 U.S. 502 at 507 *et seq.*, 62 S.Ct. 1129, 86 L.Ed. 1629 (1942). "Action of a state under its police power must give way by virtue of the Supremacy Clause". *Morris v. Jones,* 329 U.S. 545, 553; *Hines v. Davidowitz,* 312 U.S. 52.

(3) Violation of First Amendment Rights—*Jones v. Opelika,* 316 U.S. 584 at 591 *et seq.,* 62 S.Ct. 1231, 86 L.Ed. 1691 (1942); *Jamison v. Texas,* 318 U.S. 413 at 414, 63 S.Ct. 669, 87 L.Ed. 869 (1942).

(4) Denial of Due Process and Equal Protection—*Hoopeston Co. v. Cullen,* 318 U,S. 313 at 315, 63 S.Ct. 602, 87 L.Ed. 777 (1943).

(v) Statutes Involved:

(1) State Statute Challenged — The statute challenged is designated as the Highway Advertising Control Act of 1961. It was enacted as Laws of Washington, 1961, Chapter 96, p. 1575, *et seq.,* amended by Laws of Washington, 1963, First Extraordinary Session, Chapter 3, p. 1287 *et seq.,* and is codified as amended, in Revised Code of Washington (RCW) Chapter 47.42. Because of its length, the statute, in pertinent part, is reprinted in Appendix A.

The rules and regulations issued by the Washington State Highway Commission pursuant to the statute are also challenged. These are published in 3 Washington Administrative Code (WAC), Chapter 252-40. Because of their length, the pertinent portions of the rules and regulations are reprinted in Appendix B.

(2) Federal Statutes Involved

One of the main issues presented on this appeal is the invalidity of the state act by reason of the constitutional supremacy accorded more recent federal highway legislation. The highways in question are federal highways—federally subsidized to extent of 90%. Congress may "regulate that which it subsidizes". *Wickard v. Filburn* 317 U.S. 111, 131. The state court recognizes the right of Congress to regulate these highways but, notwithstanding the federal provision that payment is mandatory prior to removal of billboards, asserts the federal act is directory, not mandatory, and hence denies federal supremacy. The particular legislation which we claim is controlling, is the Highway Beautification Act of 1965, Public Law 89-285, approved October 22, 1965, 79 Stat. 1028, *et seq.,* partially codified as 23 U.S.C. §131, as recently amended by Section 6 of the Federal-Aid Highway act of 1968, Public Law 90-495, approved August 23, 1968, 82 Stat. 815 at 817. These statutes are reprinted in Appendices C and D, respectively.

Although it is not directly involved, a full understanding of the issues raised in this appeal also requires reference to an earlier federal act dealing with control of outdoor advertising; see Public Law 85-767, approved August 27, 1958, 72 Stat. 704, as amended by Public Law 86-342, approved on September 21, 1959, 73 Stat. 612.

C. Questions Presented:

The questions to be presented on this appeal are as follows:

1. Whether the federal Highway Beautification Act of 1965, is supreme and controlling over the 1961 state act by virtue of Article VI of the Constitution of the United States, particularly as to:

(a) Rejection of use of state's police power, and requirement that just compensation be paid before removal. § 101, 79 Stat. 1028 at 1029, 23 U.S.C. § 131(g) and § 401, 79 Stat. 1028 at 1033, not codified in U.S.C.; Senate Report No. 709, 89th Congress, first session, p.7; House Report No. 1084, 89th Congress, first session, p.7; Senate Report No. 542, 90th Congress, first session, p.10; House Report No. 713, 90th Congress, first session, p.5. These House and Senate Reports, all brought to the attention of the state courts, show that the word "shall" is *mandatory*. "Such payment is mandatory, not permissive, on the states". (Senate Report 709, *supra*), "The Committee emphatically and unanimously rejects the use of the police power in acquiring these rights." Ibid.

(b) Time of removal — 1970 instead of 1965 — (§101, 79 Stat. 1028 at 1029, 23 U.S.C. §131(e)).

(c) Billboards in commercial and industrial areas—protected by the federal statute, not by the state statute — (§101, 79 Stat. 1028, 23 U.S.C. §131(d); note that this section has recently been amended by section 6 of the Federal-Aid Highway Act of 1968, Public Law 90-495, approved August 23, 1968, 82 Stat. 815 at 817).

This issue of federal supremacy, if decided favorably to appellants, would be dispositive of all the other issues in this case, as it would render the 1961 state act wholly unenforceable.

2. Whether the 1961 state act is an abridgement of the free speech guarantees of the First Amendment to the Constitution of the United States, which by virtue of the Fourteenth Amendment, are binding on the states, and particularly whether the restrictions on speech violate the special protection which First Amendment rights have in relation to the equal protection clause of the Fourteenth Amendment. This question is wide open in this court and has "never been authoritatively determined". Mr. Justice Douglas in *Cammorano v. U.S.*, 358 U.S. 498, 513, footnote.

3. Whether the 1961 state act and the rules and regulations promulgated thereunder are so arbitrary and discriminatory as to deny to appellants the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution, since the state act permits many billboards, on-premise (which are not affected at all) and other off-premise boards similar to plaintiffs', to remain along these federally supported highways.

4. Whether the 1961 state act in itself is an improper exercise of the police power, as applied to a "legitimate business" (so found by Congress) not harmful in itself and not shown to be a nuisance in fact, and whether under the due process clause of the Fourteenth Amendment such a then existing legitimate business can be destroyed even under the state's police power without just compensation — an open question in this court.

D. STATEMENT OF THE CASE:

I. Federal Questions:

All federal questions presented here were raised

initially in the complaint and amended complaint, were ruled on by the trial court in its memorandum opinion, Findings of Fact and Conclusions of Law and Judgment. The questions were presented again to the Washington State Supreme Court on appeal and the trial court's disposition of those issues affirmed. The federal questions presented have been the substance of this litigation since its inception.

A synopsis of the rulings of the Washington State Supreme Court's rulings on the questions presented on this appeal follows—

(a) On supremacy of the federal act (Supremacy Clause, Art. VI):

> "Plaintiffs first contend that Congress, by the 1965 federal statute, *supra,* intended to displace contrary or inconsistent provisions in the laws of this state, and in that respect has preempted, under the supremacy clause of the federal constitution, this field of legislation. Their argument in support of this contention is based both on the conflicts between the federal statute and RCW 47.42, and on the allegedly mandatory language employed by Congress. The federal statute says, "just compensation shall be paid upon the removal of . . . outdoor advertising signs, displays, and devices" 23 U.S.C. §131(g) (Supp. II, 1967); while the state law provides for regulating billboards under the police power, without requiring the payment of compensation for any losses caused. Plaintiffs maintain that the quoted language is mandatory, and claim that §401, Pub. L. No. 89-285, *supra,* supports their conclusion. 73 W.D.2d at 425-426."
>
> ". . . We hold that Congress has not invoked the supremacy clause by preempting the field of regulation covered by the state Act; that 23 U.S.C.

§131 (Supp. 11, 1967) is directory, and does not interfere with the application of the Act as written. 73 W.D.2d at 427."

Note: The state court by-passed the *mandatory* federal provisions, which it had just quoted and, referring to other permissive features of the federal act, oddly and erroneously held that the *whole* act was directory.

(b) On free speech (First Amendment):

"This intrusive quality of highway outdoor advertising, coupled with the hazard it poses to traffic safety and its purely commercial nature, all persuade us that RCW 47.42 is a reasonable regulation which does not violate the First Amendment. There is no blanket requirement that the legislature must subordinate all other legitimate public interests to the protection of free speech. 73 W.D.2d at 437."

(c) On equal protection (Amendment XIV):

"The plaintiffs contend that the Act is contrary to the equal protection clause of the Fourteenth Amendment to the federal Constitution and the privileges and immunities clause of the state constitution . . ."

* * *

". . . We have considered all of the objections raised, and we agree with the trial court that these classifications are reasonable. We can conceive of a state of facts which justifies every classification here attacked, and this requires us to uphold the Act and the Regulations. 73 W.D.2d at 435, 436."

(d) On police power and due process (Amendment XIV):

> "We hold that the purposes of the Act as expressed in RCW 47.42.010, *supra*, are within the legitimate scope of the police power."
>
> * * *
>
> "Plaintiffs further contend that the Act deprives them of due process of law because it authorizes the taking of their property without compensation. U.S. Const. Amend. 14; Art. 1, §3. When a court determines, as we have in this case, that the police power has been properly invoked, there is no basis for this contention. 73 W.D.2d at 432 and 434, 435."

The latter is contrary to well decided cases which hold that even though a legislature under its police power may require removal of certain structures, a police power statute cannot operate retroactively to require removal of a structure which is not a nuisance in fact and deny the owner just compensation. The attempt to do so is wholly confiscatory in violation of due process of law.

Opinion of the Justices, 169 A.2d 762, 765 (N.H. 1961)

State Highway Dept. v. Branch, 152 S.E.2d 372, 373-4 (Ga. 1966)

General Outdoor Advertising Co. v. Indianapolis, 172 N.E. 309, 313-314 (Ind. 1930)

Stoner McCray System v. Des Moines, 178 N.W.2d 843, 849-850 (Iowa, 1956)

Vermont Salvage Corp. v. St. Johnsbury, 133 Vt. 341, 34 A.2d 188, 196 (1943)

This is the proper view under the Fourteenth Amendment, according to some of these state cases. The question is open in this court.

2. Synopsis of Statutes Involved:

In 1958, Congress passed the first federal legislation relating to the control of outdoor advertising on fededal subsidized highways which has any relation to the issues in this action. 72 Stat. 704, as amended by 73 Stat. 612. It

(1) Declared a national policy for encouraging and assisting the states in the elimination of outdoor advertising signs within 660 feet of the edge of the right-of-way of Interstate highways, subject to specified exceptions.

(2) Authorized the Secretary of Commerce to enter into agreements with each state to carry out this policy.

(3) Provided a bonus highway-aid payment to those states which entered into such agreements.

(4) Authorized pro-rata reimbursement to the states for costs incurred in acquiring advertising rights.

Washington State's Highway Advertising Control Act of 1961, which is challenged here, was enacted for the explicit purpose of taking advantage of the bonus provisions of the 1958 federal billboard control legislation. Except as certain implementation dates were amended during the 1963 extraordinary session of the legislature, the state Act remains intact.

The salient points of the state Act are:

> "(1) Prohibits all signs within 660 feet of interstate highway right-of-way except directional signs, for sale or for lease signs, public interest signs, and some signs, conforming to certain requirements, advertising activities within twelve

miles of the sign locations, which includes on-premises signs (R.C.W. 47.42.020(6) and .040);"

"(2) Prohibits all signs within 660 feet of "scenic highways" (specified in the Act) except directional signs, for sale or for lease signs, and on-premise advertising signs (R.C.W. 47.42.020 (7) and .040);"

"(3) Declares all prohibited signs to be a public nuisance, provides for their abatement without compensation, and provides criminal sanctions (R.C.W. 47.42.080);"

"(4) Requires a state-issued permit to be purchased for and attached to all off-premise advertising signs (R.C.W. 47.42.120);"

"(5) Requires, as amended, removal of all prohibited signs by March 11, 1964, except those in commercially or industrially zoned areas of cities and towns, where the removal date is March 11, 1965 (R.C.W. 47.42.100, as amended)."

The removal requirement of 660 feet beyond the edge of the right-of-way, while in form a regulation, is in fact a confiscation, because none of the standard signs involved are of any use 660 feet from the edge of the right-of-way (St. 169, 545; Ex. 37, P.4).

The federal Highway Beautification Act of 1965 amended the 1958 federal act, after which the 1961 state Act was patterned, and modified the former federal act in many important respects. It is the 1965 federal act which appellants assert is supreme over the inconsistent provisions of the state act, particularly as to rejection of the use of police power in favor of compensating the owners, time of removal, and allowance of signs in commercial and industrial areas. Among the significant points of the 1965 federal act are the following:

"(1) Prohibits all signs within 660 feet of interstate and primary highway rights-of-way except directional and public interest signs, for sale and for lease signs, and on-premise advertising signs (23 U.S.C.A. §131(c));"

"(2) Permits certain advertising signs within areas zoned or used for commercial or industrial purposes (23 U.S.C.A. §131(d));"

"(3) Permits information signs of interest to the traveling public at intersections along the interstate highway (23 U.S.C.A. §131(f));"

"(4) Requires just compensation be paid for all signs removed which were lawfully in existence on October 22, 1965 (23 U.S.C.A. §131(g); 401);"

"(5) Invokes a 10% penalty on federal aid highway funds if a state does not effectively control outdoor advertising pursuant to the standards of this act (23 U.S.C.A. §131(b));"

"(6) Provides a removal date of July 1, 1970, for all signs lawfully in existence on September 1, 1965 (23 U.S.C.A. §131(e))."

The rules and regulations adopted by the Washington State Highway Commission to implement the 1961 state act are too many and varied to permit accurate summarization. Suffice it to say that they, in addition to refining general size and spacing requirements, undertake to add some restrictions not apparent in the act itself, including the fixing of the relative sizes of print for local and national advertising copy (the standards differ), and adding a provision authorizing the revocation of a sign permit for violation of the act or regulations.

3. Resume of Pleadings and Proceedings:

The original complaint filed on February 26, 1964,

alleged that the appellees, who were charged with the administration and enforcement of the Highway Advertising Control Act of 1961 (hereinafter the "Act" or "state Act"), had adopted rules and regulations implementing the Act, and pursuant thereto had ordered appellants to remove, alter or move certain of their advertising signs and structures by March 11, 1964. The complaint alleged that the Act and the rules and regulations promulgated thereunder were unconstitutional (on grounds later refined by amended complaint), and prayed for a declaratory judgment to this effect, and for a temporary injunction restraining the respondents from enforcing the Act *pendente lite.*

On March 9, 1964, the court entered a temporary injunction against the enforcement of the Act.

By their answer, appellees admitted their intention to enforce the Act, and denied substantially all of the balance of the allegations of the complaint.

On January 20, 1966, appellants filed an amended complaint, which was subsequently revised pursuant to a pre-trial order to raise the issue of whether the federal Highway Beautification Act of 1965 controlled over inconsistent provisions of the state Act by virtue of the supremacy clause of the federal constitution.

The amended complaint, as revised, restates the basic allegations of the original complaint, but adds that each sign was lawfully constructed, that many are in industrially or commercially zoned or used areas, and that the present fair market value of the signs exceeded $1,000,000. It further alleges that the signs do not constitute a public nuisance as declared by the state Act, that the Act imposes unreasonable and unnecessary restrictions upon a business, not harmful in itself, which is conducted on private property owned

or leased by appellants, and that it arbitrarily and improperly invades the rights of the appellants under the guise of police power. It alleges that the state and federal constitutions are violated in that the Act is an improper exercise of the state's police power, abridges freedom of speech and press, deprives the appellants of their property without just compensation (also in violation of the federal act, which is controlling), and deprives appellants of equal protection of the law and abridges privileges and immunities guaranteed to them under the state and federal constitutions.

Appellants' prayer requested appropriate relief.

Whether appellants are entitled to just compensation from the state in an inverse condemnation proceeding was reserved in a pre-trial order dated March 28, 1966, stating, in part, that the court would

> "... reserve and not rule on whether there is a right to inverse condemnation for just compensation when any outdoor advertising structures are actually removed."

Hence this is not an issue on this appeal.

Respondents filed answers to the amended complaints, and the amended complaint as revised, admitted most of the jurisdictional matters, and denied the balance of the allegations.

The issues raised by the pleadings which were presented to the trial court were:

(1) Whether by virtue of the supremacy clause of the federal constitution, the 1965 federal act prevails over the 1961 state Act.

(2) Whether the 1961 state Act was a constitutional

exercise of the state's police power.

(3) Whether the 1961 state Act violated the equal protection clause of the 14th Amendment to the federal constitution, or the privileges and immunities clause of the state constitution.

(4) Whether the 1961 state Act violated the due process clauses of the federal and state constitutions.

(5) Whether the 1961 state Act violated the freedom of speech guarantees of the federal and state constitutions.

(6) Whether the 1961 state Act unlawfully delegated legislative power.

Trial of the cause commenced before the court, without a jury, on March 22, 1966. The trial lasted 15 days. Testimony from 26 witnesses was received, and 122 exhibits were admitted into evidence. The Statement of Facts exceeds 1900 pages. Final arguments were completed on May 11, 1966.

The court's memorandum opinion, ruling in appellees' favor on all issues of law was filed on August 19, 1966. After further proceedings, Findings of Fact, Conclusions of Law and Judgment declaring the Act and the rules and regulations promulgated thereunder constitutional, under both the state and federal constitutions, and dissolving the temporary injunction against appellees, were entered on March 10, 1967. A Notice of Appeal to the Washington State Supreme Court was filed on behalf of all plaintiffs on March 13, 1967, and the temporary injunction thereafter reinstated except as to certain signs not material here.

During the course of the proceedings, Ira R. Grant (an owner of an advertising sign in Thurston County)

and M. C. Beatie and Tranquilla Kozak (owners of real property in Cowlitz County on Interstate Highway No. 5, who leased a portion thereof for the purpose of allowing outdoor advertising structures to be erected and maintained thereon), were permitted to intervene on behalf of appellants. Their pleadings and appellees' response thereto were parallel to the principal pleadings in the action. None of the intervenors has appealed from the judgment, which was also adverse to them.

The Washington State Supreme Court affirmed the judgment of the trial court on all issues, 73 W.D.2d 413. The gist of the court's rulings on the questions here presented has been stated above. Appellants' petition for rehearing was denied except as to one change in the language of the court's opinion. (See Appendix G) This appeal followed. The state court has stayed the judgment below pending disposition of this appeal.

4. Statement of Facts:

During the course of the trial, in order to expedite it, appellants and appellees entered into a stipulation as to certain facts. (Exhibit 37) Those stipulated facts which are pertinent to this appeal, and the parties hereto, in the past here material follow:

I.

> "The plaintiffs [except intervenors] are at all times material to this lawsuit, engaged in the business of outdoor display advertising, with plants located in the State of Washington. The term "plants" in respect to each such plaintiff includes outdoor advertising signs and structures which plaintiffs own and use for outdoor advertising purposes. Said advertising company plaintiffs are lessees of land and not primarily owners of land, for the purpose of outdoor advertising

... [T]he terms of such leases are generally one to ten years."

III.

"The defendants are officials, agents and employees of the State of Washington, a sovereign state of the United States; and its legislature has enacted the law which is the subject matter of this action, being the Highway Advertising Control Act of 1961, ch. 96, Laws of 1961 as amended by ch. 3, Laws of 1963 Ex. Sess. (RCW 47.42). Neither the State of Washington nor any of the defendants has acquired any right, title or interest in any of the signs or sign structures owned by any of the plaintiffs or intervening plaintiffs."

IV.

"The Washington State Highway Commission is an administrative agency of the State of Washington and is responsible for the administration enforcement of the Highway Advertising Control Act of 1961 as amended. On the 18th day of May, 1961, the Washington State Highway Commission adopted rules and regulations implementing said act, a copy of which rules and regulations had been admitted in evidence as plaintiffs' Exhibit Number 4."

V.

"All of the advertising company plaintiffs are owners of signs and advertising structures and their plants include signs and structures which are located adjacent to and within 660 feet of the interstate routes and the scenic routes as described in the Highway Advertising Control Act as amended, and the regulations of the Washington State Highway Commission and are also owners of signs and advertising sign structures

located adjacent to and within 660 feet of federal aid primary routes within the State of Washington . . ."

VI.

"All of the signs involved in this litigation were erected in their present locations prior, and in most instances several years prior, to the enactment of the Highway Advertising Control Act of 1961 at which time no state law or state regulation precluded the erection and maintenance of such signs."

"Some of the sign structures of the advertising company plaintiffs involved in this litigation are located in rural areas; some are located in suburban areas outside the corporate limits of cities and towns; some are located within the corporate limits of cities and towns; and some are located within areas where the land is zoned for commercial or industrial use or where the land use is industrial or commercial in character."

"The advertising structures are customarily located along the high volume roads, streets and highways in positions deemed best able to attract the attention of the motorist. Signs not so located have little value for advertising purposes."

"None of the plaintiffs' signs on the Interstate or Scenic routes advertise activities conducted upon the premises upon which they are located."

VIII.

"The advertising structures of the advertising company plaintiffs required to be removed by the state act are primarily standard poster panels of approximately 300 square feet of advertising face for posting and changing messages. However, some of the affected signs are painted bulletins of

approximately 600 square feet or over. All such structures are standardized in method of construction and component parts."

IX.

"The defendants, acting pursuant to the Highway Advertising Control Act of 1961 as amended, and the regulations promulgated thereunder, have ordered all of the advertising company plaintiffs and the intervening plaintiffs, by letters such as those attached as Exhibits "A" and "B" to the revised amended complaint, to remove those of their signs above described from within 660 feet of the controlled highways as described in such state act and regulations. In each instance the conflict with the law or regulations or reasons for requiring removal of such sign was sufficiently stated in such letters. All parties agree that such notices received constitute adequate notice under the applicable law and regulations."

X.

"For varying reasons the advertising company plaintiffs are required to and regularly do relocate approximately 1½ to 10% of their sign structures annually. Such structures are depreciated for business and tax purposes over periods varying from 7 to 12½ years."

XI.

"Regarding the advertising company plaintiffs, the advertising structures on the Interstate or Scenic routes represent only a segment of each such plaintiff's plant, and such advertising structures are used for advertising of primarily national, but some local, products by primarily national, but some local, advertisers. Said structures are also used for the purpose of conveying public

messages by persons in public and private life, by churches and others. Said advertising structures are used as channels of communication, mostly commercial in nature, which reach many thousands of people every day. Also, the outdoor advertising company plaintiffs act as distributor for advertisements, political thought and messages, religious thought and messages, community thought and messages, and pleas of charitable organizations, and offer their facilities to the public for distribution of communications of all types."

XII.

"The defendants, unless restrained by the court, intend to enforce the provisions of the Outdoor Advertising Control Act of 1961, and the regulations promulgated thereunder without offering or giving compensation to any of the plaintiffs."

VIII.

"Defendants have issued permits for most of the plaintiffs' outdoor advertising structures annually for each of the years 1961 through 1966. These include the signs upon which removal notices have been given as specified in paragraph IX hereof."

* * *

XVII.

"The plaintiffs in this action, the intervening plaintiff, Ira R. Grant, and the additional intervening plaintiffs, M. C. Beatie and Tranquilla Kozak, hereinafter referred to as the "plaintiff group," by reason of the enforcement of the Highway Advertising Control Act of 1961 . . . as to advertising structures located along the Interstate and Scenic highways presently included under said act, will suffer a substantial loss in the aggregate amount of not less than $150,000.00."

"Fully reserving to the defendants their standing objection to the relevancy, competency and materiality in this action of any losses to plaintiff group through the enforcement of said state act if the state act should be amended to affect all advertising structures located along the Primary highway system, it is further stipulated that the plaintiff group will suffer a substantial additional loss of not less than $1,000,000.00."

"IT IS FURTHER STIPULATED that the foregoing amounts set forth in this paragraph XVII are agreed to for the purposes of this case only . . ."

XVIII.

"Plaintiff advertising companies own or operate with their plants within the State of Washington a total of about 7,631 advertising structures. Of this number not less than 470 such structures will be affected by the Highway Advertising Control Act of 1961. If that state act should be amended to affect all advertising structures located along the present Primary system, approximately 2,500 additional structures would be affected."

E. SUBSTANTIAL NATURE OF FEDERAL QUESTIONS:

This appeal raises several novel questions which have never been passed on by the United States Supreme Court. Each question is substantial, both in terms of importance as a matter of law, and in terms of the impact this legislation will have on this legitimate industry, and each supports acceptance of jurisdiction under 28 U.S.C. §1257(2) under the cases previously cited.

1. SUPREMACY OF THE 1965 FEDERAL STATUTE:

The supremacy of the 1965 federal legislation in rejecting the states' use of police power to achieve legislation and control of outdoor advertising has never been ruled upon by this court. The issue was apparently argued before the court in *State Highway Department v. Branch,* 222 Ga. 770, 152 S.E.2d 372 (1966), and resolved in favor of supremacy of the 1965 federal act. The Washington court has rejected the authority of that case. 73 W.D.2d at 434.

The only other reported decision involving the provisions of the 1965 federal act does not concern the issue of federal supremacy. See *Southeastern Displays, Inc. v. Ward,* 414 S.W.2d 573 (Ky., 1967).

We submit that the Washington court has patently erred, and that this error is demonstrable from the language of the act ("just compensation shall be paid," "Nothing in this Act . . . shall be construed to authorize private property to be taken . . . without just compensation) and the legislative history, both in House and Senate committee reports legislative debate. *"The committees emphatically and unanimously reject the use of police power in acquiring these rights . . . such payment is mandatory, not permissive, on the states."* Senate Report No. 709, 89th Congress, first session, p. 7; House Report No. 1084, 89th Congress, first session, p. 7; Senate Report No. 542, 90th Congress, first session, p. 10; House Report No. 713, 90th Congress, first session, p. 5.

The impact of the 1965 federal act, if held to be supreme, would be substantial, as it would, among other things:

(a) Reject as invalid non-compensatory police power removal under the state act, and provide for just compensation on sign removal;

(b) Provide a later removal time (1970) than the state act (immediate) on those signs lawfully in existence on September 1, 1965, as most of appellants' signs involved here were;

(c) Permit signs in commercial and industrial areas without regard to distance limitations.

In passing on this question the Washington court explicitly recognized, even quoted, the mandatory language in the 1965 act requiring just compensation to be paid. 73 W.D.2d at 421. This mandatory language, found in §131(g) reads,

> "(g) Just compensation shall be paid upon the removal of the following outdoor advertising signs, displays, and devices —
>
> "(1) those lawfully in existence on the date of enactment of this subsection,
>
> "(2) those lawfully on any highway made a part of the interstate or primary system on or after the date of enactment of this subsection and before January 1, 1968, and
>
> "(3) those lawfully erected on or after January 1, 1968."

The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

> "(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and
>
> "(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon."

The mandate appears again in §401:

> "SEC. 401. Nothing in this Act or the amendments made by this Act shall be construed to authorize private property to be taken or the reasonable and existing use restricted by such taking without just compensation as provided in this Act."

In the face of the mandatory language, the Washington court strangely held "that the purpose of the federal statute is obviously to induce the states to act, not to require them to do so," and that the federal act was simply "directory" and not mandatory. 73 W.D. 2d at 427.

Oddly, the state court, after quoting *the mandatory* provisions of the federal statute completely bypassed them, and, referring to other permissive features of the federal act, held that the *whole* federal act was directory. In so doing the state court disregarded the clear text of the statute itself, and ignored the Senate and House reports unqualifiedly expressing that mandatory intent.

A reading of the 1965 federal act will show that the holding of the Washington court is patently erroneous, and should be summarily reversed on this issue alone. We note that a ruling in favor of the appellants on this issue would be dispositive of all the other issues in the case, as it would render the state act wholly unenforceable and unworkable.

2. VIOLATION OF FIRST AMENDMENT RIGHTS:

The degree of free speech protection to be accorded commercial advertising is open in this court and has "never been authoritatively determined." Mr. Justice Douglas in *Cammarano v. U.S.*, 358 U.S. 498, 513, [9] footnote.

In *Valentine v. Chrestensen,* 316 U.S. 52, 86 L.Ed. 1262, 62 S.Ct. 920 (1940), a case involving the distribution of hand bills on public streets, Mr. Justice Roberts, writing for the court recognized the appropriate general rule.

> "This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares . . ."

but followed it with the statement:

> " . . . We are equally clear that the constitution imposes no such restraint on government as respects purely commercial advertising . . . (316 U.S. at 54).

This statement, as noted by Mr. Justice Douglas' concurring opinion in *Cammarano v. United States,* 358 U.S. 498 at 514, 3 L.Ed.2d 462, 79 S.Ct. 524 (1959), "has not survived reflection." Justice Douglas further observed:

> "The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise. Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive."

This observation is borne out by the application of first amendment protection to other forms of enterprise. See *Grosjean v. American Press Co.,* 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), holding a tax

on advertising revenues to be violative of the First Amendment, *Thornhill v. Alabama,* 310 U.S. 88, 84 L.Ed. 1093, 60 S.Ct. 736 (1940), holding that picketing to redress labor grievances was protected by the First Amendment, as well as recent obscenity cases such as *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1962) and *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1964).

Billboard advertising as a means of exercising free speech must be viewed in the context of the stipulation heretofore referred to and quoted to the effect that:

> "Such advertising structures are used for advertising of primarily national, but some local, products by primarily national, but some local, advertisers. Said structures are also used for the purpose of conveying public messages by persons in public and private life, by churches and others. Said advertising structures are used as channels of communication, mostly commercial in nature, which reach many thousands of people every day. Also, the outdoor advertising company plaintiffs act as distributors for advertisements, political thought and messages, religious thought and messages, community thought and messages, and pleas of charitable organizations, and offer their facilities to the public for distribution of communications of all types. (Joint Stipulation, Ex. 37).

Nor is there in the instant case any clear and present danger of destruction of life or property, invasion of the right of privacy, or breach of the peace, or indeed of *any* serious substantive evil which would justify the legislation. *Edwards v. South Carolina,* 372 U.S. 229, 9 L.Ed.2d 697, 83 S.Ct. 680 (1963). There is here no finding that any outdoor advertising structure is a nuisance, in fact or *per se.* At best there is only

"implicit" finding, demonstrably false, that there is a relationship between highway traffic safety and the presence of outdoor advertising structures.

The state conceded that it knew of no instance in which an accident had ever been attributed to the presence of a billboard, and offered no proof of any.

Because this state act, and the rules and regulations promulgated under it, permit some signs and prohibit others, require local advertisers to use one size print and national advertisers another, etc., there is also a substantial question as to whether the state act, as implemented, violates the equal protection clause of the Fourteenth Amendment, which forbids classification of free speech even where there may appear to be a rational basis for doing so. See *Board of Education v. Barnette,* 319 U.S. 624 at 639, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) and *Adams v. Hinkle,* 51 Wn.2d 763 at 784 *et seq.,* 322 P.2d 844 (1958).

The Washington court nevertheless affirmed the trial court's holding that the First Amendment was not violated by holding that the act was "a reasonable regulation" relying on the quotation from Mr. Justice Roberts quoted above which has already been characterized by Mr. Justice Douglas as not having "survived reflection." That is not sufficient to justify an infringement of freedom of speech, especially discrimination in its exercise.

The permits which must be obtained before a message may be displayed, and the reporting of changes in the advertising copy prior to making the change, and which permits are revocable by appellees for failure of the sign to conform to the regulations (and may also subject the permittee to criminal prosecution) are also a form of unconstitutional prior restraint. *Lovell*

v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938).

All of these first amendment questions, not presently determined in the context of commercial off-highway advertising are so substantial as to warrant full briefing and consideration by this court.

3. DENIAL OF EQUAL PROTECTION:

A part of the equal protection argument is implicit in the discussion of the free speech issue; it alone is sufficiently substantial to warrant the court's acceptance of jurisdiction.

In addition, the act and the rules and regulations promulgated thereunder are replete with instances of wholly arbitrary discrimination, which the Washington court dismissed with discussion.

> "We can conceive of a state of facts which justifies every classification here attacked, and this requires us to uphold the Act and the Regulations. 73 W.D.2d at 436.

But, there is no reasonable basis for the distinction made as to those signs which fall into the prohibited classes, and those which do not; the "classification" itself is so inconsistent and discriminatory that it is impossible to discern a class at all.

As examples:

(1) The act would permit an "on-premise" sign, while outlawing the same sign on an adjacent piece of property.

(2) The act singles out the business of outdoor advertising by partially prohibiting it in commercial and industrial areas where all other legitimate busi-

nesses may operate.

(3) Requires national advertisers to conform to limitations on letter size, while such limitations do not apply to local advertisers.

(4) Permits off-premises signs advertising local businesses, whereas a sign in the same location which advertised a national business would be prohibited.

(5) Non-located activities, such as political and charitable messages, are prohibited because they have no "location."

Further examples are legion; these suffice to show the range of discrimination in effect. Discrimination of this sort cannot be justified by different business characteristics when it has no reasonable relation to those differences, nor to the purposes of the statute. *Morey v. Doud,* 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 485 (1957).

The test set out in *Walters v. St. Louis,* 347 U.S. 231 at 237, 98 L.Ed. 660, 74 S.Ct. 505 (1954) is not satisfied:

> "Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary."

4. DENIAL OF DUE PROCESS OF LAW:

The due process issue is raised as the concommitant of the state act's being an invalid exercise of the police power. The argument directed to the inappropriateness of this means of "regulating" the outdoor adver-

tising business is separate from that raised in the federal supremacy argument, *supra,* as here the invocation of the police power is challenged on the grounds that it far exceeds the historical bounds of that doctrine.

Appellants' arguments proceed from the unchallenged premise that outdoor advertising is a "legitimate business," "an integral part of the business and marketing function and an established segment of the national economy." Senate Report 709, 89th Congress, first session, p. 6, on S. 2084, later the federal Highway Beautification Act of 1965. As such, it is not a nuisance *per se.* Nor is there any finding in this case that any sign is a nuisance in fact, which would provide a basis for the exercise of police power.

Appellants' business and structures affected are existing uses of private property. Removal of those structures destroys the value of the structures, impairs the value of the business and destroys the income-producing value of much of the land on which the signs are located. This business is conducted on private, not public, property.

The only support the Washington court found for this exercise of police power was the "implicit" finding of the trial court that there was a substantial relationship between traffic safety and the presence of highway outdoor advertising. A review of the trial court's Findings of Fact and Conclusions of Law clearly shows that the trial court never made a finding of a substantial relationship between traffic safety and outdoor advertising. Its finding (No. VII) merely says that there is "sufficient evidence to show that reasonable men could find that a relationship does exist . . . "; ***but there is no finding that it does exist, or that it is substantial.*** (Emphasis ours.) Rather, as noted in the court's Conclusions of Law (Nos. II and

III), the court concluded: "There appears to be considered opinion both *pro* and *con,*" and that "reasonable minds may differ as to whether the facts as found herein justify the exercise of the police power." Surely this does not accord with the requirement of a substantial relation to the object of the legislation, as set out in *Mugler v. Kansas,* 123 U.S. 623 at 661, 8 S.Ct. 273, 31 L.Ed. 205 (1887), and the line of cases since.

Nor is the police power properly invoked when it does not affect alike all persons similarly situated. *Mountain Timber Co. v. Washington,* 243 U.S. 219 at 237, 239, 37 S.Ct. 260, 61 L.Ed. 685 (1917).

Although ignored by the trial court, the state Supreme Court also mentioned that exercise of police power might be justified on the grounds of aesthetics. Whether aesthetics, as a sole ground, is a proper basis for invoking police power has never been answered by this court. The ruling of the Washington court would transform what has historically been a doctrine of necessity into one of nicety, a transformation which has most serious implications to all property owners in this country. This question, if reached, is alone so great, and the arguments so many, that it deserves to be briefed and argued in full.

If the state act is not a valid exercise of the police power, removal without compensation is thus patently a violation of due process, surely a matter of sufficient substance to warrant this court's exercise of jurisdiction in this cause.

Moreover, as pointed out earlier, with citation of cases, even if the state can compel the removal of billboards existing at the time of the passage of the state act and at all times since, even a state police power statute cannot operate retroactively to require

removal of a structure which is not a nuisance in fact, without requiring just compensation to the owner.

This raises a federal question under the Fourteenth Amendment decided favorably to appellants' position in some state courts but not heretofore determined by this court.

F. OPINIONS AND JUDGMENT APPEALED FROM:

The trial court's memorandum opinion dated August 18, 1966 is printed in Appendix E; the state Supreme Court's opinion filed March 26, 1968, and reported at 73 W.D.2d 413, is reprinted in Appendix F, and the latter court's Order Denying Petition for Rehearing and Changing Opinion is reprinted in Appendix G. The judgment of the trial court is printed in Appendix H.

Respectfully submitted,

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